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No. 06-97

IN THE

# Supreme Court of the United States

STOLT-NIELSEN S.A., *et al.*,
*Petitioners,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## BRIEF OF WASHINGTON LEGAL FOUNDATION, NATIONAL ASSOCIATION OF MANUFACTURERS, AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

Do the federal courts lack authority, under the Separation of Powers, to enjoin federal prosecutors from breaching a binding contractual obligation "not to bring any criminal prosecution" against a company and its executives?

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## INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and

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[1] Pursuant to Supreme Court Rule 37.6, amici states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than amici and their counsel, contributed monetarily to the preparation and submission of this brief.

accountable government. In particular, WLF has frequently appeared in this and other federal and state courts to address the proper scope of criminal prosecutions against members of the business community. *See, e.g., Arthur Andersen LLP v. United States,* 544 U.S. 696 (2005); *Blandford v. United States, cert. denied,* 540 U.S. 1177 (2004); *Riverdale Mills Corp. v. Pimpare,* 392 F.3d 55 (1st Cir. 2004).

The National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increased understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit organization with direct national membership of over 13,000 attorneys, in addition to more than 28,000 affiliate members from every state. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. NACDL's mission is to ensure justice and due process for the accused; a critical component of that mission is to promote the proper balance among the three branches of government in order to protect the adversarial system of justice.

*Amici* are concerned that if the decision below is allowed to stand, the business community and the public at large will lose the many benefits derived in recent years from the U.S. Department of Justice's Corporate Leniency Policy. That policy – by encouraging companies voluntarily to report

illegal antitrust activity – has facilitated government antitrust enforcement and thereby strengthened free-market competition. The decision below prohibits the federal courts from enforcing government promises – made in connection with the Corporate Leniency Policy – not to indict cooperating businesses. *Amici* are concerned that even if companies and individual defendants are later able to invoke such promises to win dismissal of an indictment, the prohibition against pre-indictment enforcement of such promises will significantly undercut their willingness to come forward with evidence of illegal antitrust activity.

WLF and NAM have no direct financial interest in the outcome of this case, and none of the Petitioners are members of NAM. *Amici* are filing due solely to their interest in ensuring that companies and individuals entering into negotiations with prosecutors can do so with the assurance that promises made by prosecutors are enforceable. *Amici* are filing this brief with the consent of all parties. The written consents have been lodged with the Clerk of the Court.

## STATEMENT OF THE CASE

This petition raises an important constitutional question regarding the power of federal courts to enjoin federal prosecutors from bringing a criminal indictment. The court below held that federal courts (except under very limited circumstances not applicable here) lack such power. Other federal appeals courts have disagreed, holding that federal courts possess such power whenever (as Petitioners allege is true here) the plaintiff lacks an adequate remedy at law and will suffer irreparable harm unless an injunction is issued.

In late 2002, an attorney for Petitioner Stolt-Nielsen S.A. contacted attorneys with the U.S. Department of Justice's

Antitrust Division regarding possible violations of federal antitrust law. Pet. App. 5a. Stolt-Nielsen's attorney inquired regarding amnesty from antitrust prosecution against Stolt-Nielsen in return for information regarding illegal collusive trading practices among firms providing parcel tanker shipping services. *Id.* The federal government has in place a Corporate Leniency Policy, which accords leniency to corporations that voluntarily report their illegal antitrust activity. *Id.* 72a-75a. Pursuant to that policy, the federal government generally will not bring criminal charges against a firm that comes forward voluntarily, if certain conditions are met – including that the government has not previously received information about the illegal activity from another source, the firm cooperates completely with the government investigation, and restitution is made to injured parties. *Id.*

Stolt-Nielsen's discussions with the Antitrust Division ultimately resulted in the parties entering into a Conditional Leniency Agreement on January 15, 2003. *Id.* 65a-71a. Pursuant to that Agreement, Stolt-Nielsen turned over information to the government that led to criminal convictions of several firms and individuals for violations of the antitrust laws. *Id.* 7a. The federal government later terminated the Agreement and threatened to indict Stolt-Nielsen and several of its executives, claiming that Stolt-Nielsen had failed to fulfill its obligations under the Agreement by failing to inform the government that antitrust violations continued after March 2002. *Id.* 8a.

Stolt-Nielsen and one of its executives thereafter filed suit against the United States in U.S. District Court for the Eastern District of Pennsylvania, seeking an injunction against their indictment. In January 2005, the district court granted an injunction. *Id.* 34a-50a. The court initially determined that pre-indictment review was appropriate "because if an

indictment were later determined to have been wrongfully secured, it would be too late to prevent the irreparable consequences." *Id.* 45a. The court went on to conclude that an injunction was warranted because the government received the benefit of its bargain and thus was contractually obligated to abide by its promise not to prosecute Stolt-Nielsen and its executives. *Id.* 47a-50a.

The Third Circuit reversed. *Id.* 1a-21a. It held that federal courts have the power to hear pre-indictment challenges to threatened prosecutions only "where the mere threat of prosecution would inhibit the exercise of First Amendment freedoms." *Id.* 13a.[2] The appeals court held that in all other situations, a criminal defendant's ability to move to dismiss the indictment constitutes an adequate remedy at law, thereby precluding resort to the federal courts' equitable powers. *Id.* 19a-20a. The court said that any such injunction would violate Separation-of-Powers principles. *Id.* In light of its jurisdictional holding, the court declined to consider whether the government breached its agreement not to indict Stolt-Nielsen. *Id.* 21a n.7.

On July 20, 2006, Stolt-Nielsen, an affiliated corporation, and one of its executives filed this petition. On September 8, 2006, the United States obtained a criminal indictment against Stolt-Nielsen, two affiliated corporations, and two corporate executives. *United States v. Stolt-Nielsen S.A.*, Crim. No. 06-466 (E.D. Pa.). The indictment alleges that the defendants

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[2] In connection with its denial of a petition for rehearing, the Third Circuit panel amended its opinion to indicate that while there is a "general rule" against pre-indictment review, there is an exception to the general rule "in order to avoid a chilling effect on constitutional rights" – not simply, as the original opinion stated, to avoid a chilling effect on First Amendment rights. *Id.* 22a-25a.

engaged in a conspiracy in unreasonable restraint of trade in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. The factual allegations contained in the indictment are derived from the information provided to the government by Stolt-Nielsen and its executives.

## REASONS FOR GRANTING THE PETITION

This case presents an issue of exceptional importance to the entire business community, as well as all individuals facing criminal charges. The Third Circuit has held that even when federal prosecutors promise in writing not to indict a firm and its employees that cooperate in ongoing investigations of antitrust violations, federal courts lack jurisdiction to consider pre-indictment efforts to enforce that promise. Businesses often agree to cooperate with such investigations precisely because they have been promised that they will not be indicted. If businesses discover that they lack legal recourse to ensure that they receive the benefit of their bargains, they will be far less likely to report antitrust violations – thereby hindering enforcement and lessening free-market competition.

Petitioners have ably demonstrated that the federal appeals courts are sharply divided on that question, thereby warranting the Court's review. *Amici* write separately to focus on the Third Circuit's fundamental misunderstanding of this Court's case law regarding pre-indictment injunctions.

As this Court recently explained, comity considerations are the principal basis upon which federal courts may decline to exercise jurisdiction over challenges to criminal prosecutions. *Hamdan v. Rumsfeld,* 126 S. Ct. 2749, 2769-72 (2006). Thus, "the notion of 'comity,' that is, a proper respect for state functions," requires federal courts in most instances to abstain from hearing challenges to state-court criminal

prosecutions, even when the prosecution is based on a statute that is unconstitutional "on its face." *Younger v. Harris*, 401 U.S. 37, 44, 54 (1971). Similarly, considerations of comity to the military court system dictate that federal courts should generally abstain from hearing challenges to on-going court-martial proceedings. *Schlesinger v. Councilman,* 420 U.S. 738, 740, 758 (1975). But in the absence of such comity considerations, there is no reason to "permit federal courts to depart from their general 'duty to exercise the jurisdiction that is conferred on them by Congress.'" *Hamdan*, 126 S. Ct. at 2772 (quoting *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996)). Any such comity considerations are minimal when a federal court is asked to enjoin federal prosecutors from bringing an indictment in *federal* court.

The issue is not at all one of jurisdiction, which (contrary to the Third Circuit's decision) the federal courts so clearly possess in this case. Rather, the issue is whether Stolt-Nielsen has met the traditional prerequisites for obtaining equitable relief: a showing that it lacks an adequate remedy at law and will suffer irreparable injury if denied relief. The January 15, 2003 Conditional Leniency Agreement provided that if Stolt-Nielsen complied with its obligations under the Agreement, the federal government "agree[d] not to bring any criminal prosecution against" Stolt-Nielsen, its affiliates, and its current and former directors, officers, and employees. Pet. App. 68a-69a. Stolt-Nielsen alleges that it met its obligations under the Agreement, an allegation the Third Circuit did not dispute. Review is warranted to determine whether a post-indictment motion to dismiss is really an "adequate remedy at law" for the government's alleged breach of its promise "not to bring any criminal prosecution" – particularly in light of Stolt-Nielsen's evidence regarding the substantial collateral consequences of an indictment.

The federal government's September 8, 2006 indictment of Stolt-Nielsen, two affiliated corporations, and two corporate executives in no way lessens the importance of this Court's review of the Third Circuit's decision. A decision on any motion to dismiss the indictment will not answer the fundamental issue raised by the petition: whether parties may seek pre-indictment enforcement of a government promise not to bring an indictment. That issue, which has divided the federal appeals courts, is of utmost importance to companies contemplating coming forward with evidence of wrongdoing under the Corporate Leniency Policy. In light of that importance, review is warranted.

Moreover, review by this Court continues to be of great importance to Petitioners themselves. Under normal operation of criminal procedure rules, Petitioners cannot expect any motion to dismiss the indictment to be heard before the fall of 2007. In contrast, should this Court grant review, Petitioners are likely to have a decision more quickly – no later than the end of the Court's Term in June 2007. Given the significant negative consequences of a pending indictment on Stolt-Nielsen's business activities, anything Stolt-Nielsen can do to accelerate the judicial review process is of tremendous benefit to it.

Finally, Stolt-Nielsen has a significant interest in ensuring that no other current or former executives, officers, or directors are indicted. Unless the petition is granted, Stolt-Nielsen will have no means of ensuring that its interest in preventing such indictments is vindicated.

## I. REVIEW IS WARRANTED TO DETERMINE WHETHER THE THIRD CIRCUIT, IN CONFLICT WITH OTHER CIRCUITS, HAS MISCONSTRUED THE RATIONALE UNDERLYING APPROPRIATE EXERCISE OF FEDERAL COURT EQUITABLE JURISDICTION

Neither the Third Circuit nor the Department of Justice disputes that Petitioners' complaint falls within the federal courts' federal question jurisdiction. Accordingly, their assertions that the federal court's lack "jurisdiction" to hear this dispute can only be based on an assertion that suits to enjoin federal criminal indictments are among the class of cases in which abstention is warranted. As we demonstrate *infra*, that assertion finds no support among the abstention cases upon which they rely. Review is warranted to determine whether the Third Circuit's expansion of abstention doctrine, an expansion that conflicts with other federal appeals court decisions,[3] is consistent with the federal courts' "general duty to exercise the jurisdiction that is conferred on them by Congress." *Hamdan*, 126 S. Ct. at 2772 (internal quotation omitted).

This Court has explained that federal courts should abstain from exercising jurisdiction over challenges to criminal prosecutions when doing so is necessary to promote comity – that is, harmony and mutual respect – among parallel criminal justice systems. Thus, for reasons of comity, federal courts generally abstain from exercising jurisdiction over challenges to state-court criminal prosecutions brought in good faith, even when the prosecution is based on a statute that is unconstitutional "on its face." *Younger v. Harris*, 401 U.S. at

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[3] *See, e.g., United States v. Meyer*, 157 F.3d 1067 (7th Cir. 1998).

54.[4] Rather, state courts are deemed adequate to consider such constitutional claims; and defendants unhappy with the state courts' determinations may seek review of those decisions in this Court.

Similarly, the Court has explained that comity considerations generally require federal courts to abstain from hearing challenges to on-going court-martial proceedings, even when the petitioner contends that the military court system lacks jurisdiction over the charges filed against him. *Councilman*, 420 U.S. at 758. That is so even though, at the time that *Councilman* was decided in 1975, defendants in military court proceedings lacked any right to seek appellate review of their convictions in a federal court.

But where comity or similar considerations are not at issue, the Court has explained that federal courts should not shun their duty to exercise the normal equitable jurisdiction conferred on them by Congress. *Hamdan*, 126 S. Ct. at 2772. Thus, the Court ruled in *Hamdan* that considerations of comity did not dictate that federal courts should abstain from hearing challenges to war crimes proceedings before a military commission, because the commission system was a recently created, *ad hoc* court system to which there was no need to defer in the interests of inter-court harmony. *Id.* at 2771.

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[4] The Court has created limited exceptions to that rule, as when a threatened state-court prosecution threatens to chill First Amendment rights, and – in light of potential repeat prosecutions – successful defense of one prosecution would not eliminate the chill. *Dombrowski v. Pfister*, 380 U.S. 479 (1965). Similarly, federal court intervention is appropriate to enjoin state-court criminal proceedings that threaten constitutionally protected property rights, where the plaintiff lacks an effective means of protecting those rights in the state proceedings. *Truax v. Raich*, 239 U.S. 33, 37 (1915).

Comity considerations similarly do not come into play when a federal court is asked to enjoin federal prosecutors from bringing an indictment in *federal* court. There is no danger of creating disharmony among competing criminal justice systems when the prospective criminal charge is to be filed in the same federal district court (in this case, the U.S. District Court for the Eastern District of Pennsylvania) as the action brought to enjoin the indictment.

In declining to exercise jurisdiction over Petitioners' claims, the Third Circuit suggested that its decision was dictated by Separation-of-Powers concerns. Pet. App. 12a. This Court has never so held. While the Executive Branch has absolute discretion regarding an initial decision to bring criminal charges (and thus the courts may not second-guess a decision not to bring charges), the Court has not suggested that there exist constitutional limitations on the federal courts' power to act once federal prosecutors have indicated their intent to move forward with criminal charges. For example, in *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949), the Court upheld an injunction against federal criminal prosecution of fish canning companies for alleged violations of federal fishing regulations, without once suggesting that the injunction raised Separation-of-Powers concerns. Indeed, given the Department of Justice's concession that a federal district court is empowered to dismiss an indictment on the grounds that the government breached a promise not to bring an indictment, [5] there can be no plausible constitutional objection to permitting pre-indictment challenges. A pre-indictment injunction premised on enforcement of a promise not to prosecute is no

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[5] This Court held in *Santobello v. New York*, 404 U.S. 257, 262-63 (1971), that courts may enforce promises made to criminal suspects by prosecutors during the course of their negotiations, because "the interests of justice" so demand.

greater an intrusion on Executive Branch discretion than is post-indictment dismissal based on similar grounds.

The Court explained in *Hynes* that an action to enjoin a federal prosecution should be judged under the traditional prerequisites for obtaining equitable relief: a showing by the plaintiffs that "they are without an adequate remedy at law" and that they "will suffer irreparable injury" unless an injunction is issued. *Id.* at 98. Review is warranted to decide whether the Third Circuit erred in determining, contrary to *Hynes*, that the federal courts lacked jurisdiction to consider Petitioners' claims.

There can be little doubt that Petitioners lack an adequate remedy at law. The January 15, 2003 Conditional Leniency Agreement provided that if Stolt-Nielsen complied with its obligations under the Agreement, the federal government "agree[d] not to bring any criminal prosecution against" Stolt-Nielsen, its affiliates, and its current and former directors, officers, and employees. Pet. App. 68a-69a. Stolt-Nielsen alleges that it met its obligations under the Agreement, an allegation the Third Circuit did not dispute. There is no plausible interpretation of the Agreement other than that the Department of Justice promised not to indict Stolt-Nielsen under those circumstances. Accordingly, the opportunity to file a post-indictment motion to dismiss cannot be deemed "an adequate remedy of law" because it fails to provide Stolt-Nielsen with the benefit for which it bargained: immunity from indictment.

Moreover, Stolt-Nielsen has proffered substantial evidence that prohibiting a pre-indictment challenge will cause it irreparable harm. In particular, contractual rights conferred on Stolt-Nielsen by the Agreement are property rights; the Fifth Amendment protects corporations and individuals from

deprivation of property without due process of law. Yet, the Department of Justice has deprived Stolt-Nielsen of its property with no process whatsoever; it has unilaterally declared that Stolt-Nielsen has forfeited its property right due to its alleged breach of the Agreement. In the absence of pre-indictment review of such decisions in the federal courts, criminal suspects have no means of protecting their property rights. Review is warranted to determine whether the loss of valuable property rights without due process of law constitutes irreparable harm. *See, e.g., Abney v. United States*, 431 U.S. 651, 660 (1977) (criminal defendant may collaterally appeal an adverse ruling on a defense of double jeopardy; relegating such a defendant to an appeal following conviction constitutes irreparable harm because it would irrevocably deprive him of the constitutional right not to be forced to stand trial a second time).

In the appeals court, the Justice Department relied heavily on the D.C. Circuit's decision in *Deaver v. Seymour*, 822 F.2d 66 (D.C. Cir. 1987), a challenge to the constitutionality of the federal independent counsel statute. In fact, *Deaver* is strongly supportive of Stolt-Nielsen's position. In denying a pre-indictment challenge to criminal charges, the court noted that the plaintiff did not assert that either an indictment or a trial would violate his constitutional rights; he was merely challenging the authority of a particular prosecutor to bring charges. *Id.* at 71. In denying him pre-indictment review, the court contrasted the plaintiffs' claims to those of individuals deemed entitled to seek relief, noting that in the latter set of cases the claimants "had alleged the violation of a specific right guaranteed by the Constitution, the legal and practical value of which would be destroyed" unless immediate judicial review were permitted. *Id.* at 70. Thus, *Deaver* supports the availability of injunctive relief for those, such as Petitioners, who assert that denial of injunctive relief

will result in irreparable harm because the practical value of their Fifth Amendment due process rights will be destroyed.

In sum, the actions of the Third Circuit – basing denial of relief on jurisdictional grounds and failing to base its decision on the traditional prerequisites for obtaining equitable relief – contrast sharply with the approach taken by this Court as well as other federal appeals courts. Review is warranted to resolve that conflict.

## II. THE SEPTEMBER 8, 2006 INDICTMENT OF STOLT-NIELSEN DOES NOT LESSEN THE IMPORTANCE OF REVIEW BY THE COURT

Without awaiting the Court's disposition of this certiorari petition, the federal government on September 8, 2006, obtained a criminal indictment against Stolt-Nielsen, two affiliated corporations,[6] and two corporate executives.[7] *United States v. Stolt-Nielsen S.A.*, Crim. No. 06-466 (E.D. Pa.). The indictment alleges that the defendants engaged in a conspiracy in unreasonable restraint of trade in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. The factual allegations contained in the indictment are derived from the information provided to the government by Stolt-Nielsen and its executives.

The indictment neither renders the petition moot nor lessens the importance of this Court's review of the Third Circuit's decision. Petitioners could, of course, file a motion

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[6] Stolt-Nielsen Transportation Group Ltd. (Liberia) and Stolt-Nielsen Transportation Group Ltd. (Bermuda).

[7] Samuel A. Cooperman, Chairman of Stolt-Nielsen; and Petitioner Richard B. Wingfield.

in the district court to dismiss the indictment. But a decision on any motion to dismiss the indictment will not answer the fundamental issue raised by the petition: whether parties may seek pre-indictment enforcement of a government promise not to bring an indictment. That issue, which has divided the federal appeals courts, is of utmost importance to companies contemplating coming forward with evidence of wrongdoing under the Corporate Leniency Policy, as well as to all individuals facing criminal charges. In light of that importance, review is warranted.

The Corporate Leniency Policy does, of course, make clear that leniency is contingent upon a corporation "report[ing] the wrongdoing with candor and completeness and provid[ing] full, continuing and complete cooperation to the [Antitrust] Division throughout the investigation." Pet. App. 72a. But nothing in the Policy, or in the Agreement entered into between Stolt-Nielsen and the Justice Department, provides any inkling that the Department of Justice is to be the sole judge of candor and completeness. By now taking the position that it is, indeed, the sole judge of those issues (at least until after the company has been deprived of its contractual right not to be prosecuted), the Department of Justice can fairly be accused of deceiving companies that entered into Amnesty Agreements in the good-faith belief that they would be entitled to a meaningful hearing on their contractual rights. Review is warranted to determine whether the United States government should be permitted to conduct its affairs in this manner. Moreover, amici respectfully submit that companies will be significantly less willing to come forward with evidence of illegal antitrust activity if they are deprived of the ability to enforce the cooperation agreements they enter into with prosecutors. If review is denied, those concerns will persist regardless whether Stolt-Nielsen wins a district court motion to dismiss the indictment.

Moreover, review by this Court continues to be of great importance to Petitioners themselves. Under normal operation of criminal procedure rules, Petitioners cannot expect any motion to dismiss the indictment to be heard before the fall of 2007. In contrast, should this Court grant review, Petitioners are likely to have a decision more quickly – no later than the end of the Court's Term in June 2007. The demise of Arthur Andersen LLP – despite its ultimate vindication in the criminal courts, *see Arthur Anderson LLP v. United States*, 544 U.S. 696 (2005) – well illustrates the crippling effect that pending criminal charges can have on a company's ability to continue as a going concern. Given the significant negative consequences of a pending indictment on Stolt-Nielsen's business activities, anything Stolt-Nielsen can do to accelerate the judicial review process is of tremendous benefit to it.

Finally, Stolt-Nielsen has a significant interest in ensuring that no other current or former executives, officers, or directors are indicted. The Amnesty Agreement provided that "subject to [Stolt-Nielsen's] full, continuing, and complete cooperation," the Antitrust Division agreed that such individuals would "not be prosecuted criminally" in connection with the anticompetitive activity being reported, provided that such individuals "admit their knowledge of, or participation in, and fully and truthfully cooperate with the Antitrust Division in its investigation of the anticompetitive conduct being investigated." Pet. App. 68a-69a. Unless the petition is granted, Stolt-Nielsen will have no means of ensuring that its interest in preventing such indictments is vindicated. To date, two Stolt-Nielsen executives – Richard Wingfield and Samuel Cooperman – have been indicted; thus, they are in a position to file motions to dismiss their indictments. But even a district court order dismissing all pending indictments would not eliminate the threat that other

corporate officials could be indicted. Review is warranted to permit Stolt-Nielsen an opportunity to remove that threat.

## CONCLUSION

*Amici curiae* Washington Legal Foundation, the National Association of Manufacturers, and the National Association of Criminal Defense Lawyers respectfully request that the Court grant the petition for a writ of certiorari.

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